

## English and Foreign Divorce Law in relation to Mental Disorder.

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According to the law of England, where a marriage has once been validly contracted, the usual incidents belonging to it attach and continue notwithstanding the *subsequent* insanity of either party: that is to say, in the present state of the law supervening insanity of *itself* will not operate as a dissolution of the bond, nor afford a ground for a decree of dissolution of the marriage, or of judicial separation.

The question whether insanity arising during the marriage state will, in any circumstances, be a defence to charges of misconduct has received the consideration of the Courts, and it has been held that even if insanity can in any circumstances be admitted as a defence to proceedings for divorce on the ground of misconduct it is necessary that the plea should state that the insanity is *lasting and abiding* and that there is no hope of recovery or of amelioration, and that it is not a mere recurrent or intermittent insanity. In a case where a husband who had returned to the conjugal home after a period of confinement in an asylum, was subject to fits of mania which endangered the safety of the wife, it was held that she was entitled to the protection of the Court by the grant of a judicial separation: the Court had no power to dissolve the marriage. The decision in *Hanbury v. Hanbury* was based on the fact that at the time the respondent committed certain acts of cruelty and adultery he was capable of understanding the natural and probable consequences of his acts, the jury having been satisfied, especially on the evidence of Dr. Henry Maudsley, that the insanity was intermittent: in these circumstances the Court granted the wife a *decree nisi*, but it must not be assumed that if the insanity had been proved to have been absolute and permanent the divorce would not have been granted.

In this connexion it is necessary to bear in mind that the courts insist upon proof that the misconduct complained of is the consequence of the insanity.

In the leading case of *Yarrow v. Yarrow* a married woman admitted having committed adultery, and was subsequently sought to be divorced by her husband: the guardian *ad litem* (who was appearing for the wife who was at the date of the action detained in a lunatic asylum) opposed the petition on the ground that the wife was insane at the time of the adultery. In the opinion of the Court the defence of insanity was not allowable, inasmuch, as although the wife may have had certain delusions and was not absolutely of sane mind, she was quite capable, at the date of the act of adultery, of appreciating the character of her acts and the probable consequences thereof, i.e., that a petition would be brought for her divorce. In these circumstances, the husband's petition was granted. The decision in this case depended

entirely upon the degree of the insanity. The President of the Court said that he was by no means sure that if the respondent were suffering from insanity of such a degree as would entitle an accused person to acquittal on an indictment for a crime, such insanity would constitute a valid defence to a suit for divorce on the ground of adultery.

As to the legal effect of insanity of one of the parties to the hearing of a petition for divorce on the ground of adultery, reference may usefully be made to the important case of *Mordaunt v. Moncreiffe*, where it was held unanimously by the House of Lords that the insanity of the respondent is no bar to proceedings for divorce and that the respondent's defence should be conducted by a guardian *ad litem*. The case is particularly interesting by reason of the fact that the House of Lords obtained the opinions of the judges upon the important question of principle which was raised. The *ratio decidendi* was that if the petitioner were prevented from having his petition heard, the effect would be that insanity would of itself be a defence to a charge of adultery, and that this was clearly not the intention of the Divorce Act, inasmuch as the statute directed the Court, upon the petition of the husband in cases of adultery committed by the wife, to pronounce a decree declaring the dissolution of the marriage. The House of Lords refused to allow the insanity of the respondent to bar or to impede the investigation of the charge of adultery brought by the petitioner, and sent the case back to the Court below with directions to proceed with the hearing of the petition notwithstanding the insanity of the respondent.

In *Hanbury v. Hanbury* the President of the Divorce Court (Sir Charles Butt) stated that the object of the Divorce Act is not so much the punishment of retribution for a marital offence as the protection of the party in peril. On this principle, if it can be shown that the insanity of the husband is of such a nature as to endanger the safety of the wife she is entitled to the protection of the Court. Sir Charles Butt said that, while the Divorce Act does not entitle a woman in such a case to have her marriage dissolved, he would be disposed to hold that acts of cruelty committed during an attack of mania would entitle a wife to be legally separated from her husband.

As to the question whether insanity of so pronounced a degree that the party has to be confined in an asylum or in some other place of permanent detention, and the disease is such that there is no hope of recovery or amelioration such as will allow of the patient's discharge will be a good defence to a petition for divorce on the ground of adultery with cruelty, there is no doubt, since the decision in *Hanbury v. Hanbury*, that if the act complained of be committed during such insanity, the marriage will not be dissolved. Sir Charles Butt said:—"When a disease of mind of so pronounced a type seizes upon a person and he or she has to be incarcerated or permanently to be placed in confinement, I should hesitate to say that in regard to an act committed in such a state of insanity a plea of insanity might not be an answer."

The law of England to-day is that the insanity, even of an incurable type, *e.g.*, general paralysis of the insane, of either a husband or wife does not, *ipso facto*, entitle the other party to a divorce or even to a judicial separation. *Divorce* will not in any circumstances be granted

upon the ground merely of the insanity of one of the parties; and *judicial separation* will be granted only in circumstances similar to those set out above.

The hope or expectation which operates or has been operating in the mind of a husband, whose wife has become insane after having committed adultery, that he may be released from the marriage by the death of his wife, may be accepted by the Court as a valid excuse for, or explanation of, what would otherwise amount to "unreasonable delay" in filing his petition for a divorce.

With reference to the foregoing statement of the law of England as to supervening insanity as a ground for divorce, it is interesting to consider the following recommendation of the Royal Commission on Divorce and Matrimonial Causes with reference to the question of insanity as a ground for divorce:—

That insanity should be introduced as a ground for divorce subject to the following limitations and conditions:—

- (i) The insanity which should form a ground for divorce should be certified as incurable, and
- (ii) The insane spouse should have been continuously confined, under the provisions of the Lunacy Acts for the time being in force, for not less than five years.
- (iii) The insanity should be found to be incurable to the satisfaction of the Court.
- (iv) This ground should operate only when the age of the insane person is, if a woman, not over fifty years, and if a man, not over sixty years.

In this connexion it is instructive to have set out by way of comparison a statement of the law of other countries in regard to the matter under consideration.

#### BRITISH DOMINIONS.

*Scotland.* Insanity is not a ground for divorce.

*Ireland.* The only way by which divorce may be obtained in Ireland is by means of a private Act of Parliament: insanity is not allowed to be a ground for the passing of such an Act.

*Isle of Man.* Insanity is not a ground for divorce.

*Channel Islands.* The Courts have no power to grant divorce.

*British India.* (1) Insanity is not a ground for divorce among the Christian communities in India—to whom alone the Indian Divorce Act of 1869 applies.

(ii) Under the *Mahomedan Law* a husband may divorce his wife without any misbehaviour on her part, or without assigning any cause.

(iii) Divorce, in the ordinary sense, is unknown to the *Hindu Law*: the Hindus contend that even death does not dissolve the bond of marriage.

*Dominion of Canada.* In none of the provinces is insanity a ground for divorce.

*Union of South Africa.* In none of the provinces is insanity a ground for divorce.

*Newfoundland.* There is no Court in the colony which has jurisdiction to pronounce a divorce.

*New South Wales.* Insanity is not a ground for divorce.

*Dominion of New Zealand.* By the Divorce and Matrimonial Causes Act, 1908 (No. 50 of the Consolidated Statutes of New Zealand), whether the petitioner is husband or wife, divorce may be obtained on the ground that the respondent is a lunatic or person of unsound mind and has been confined in an asylum or other institution or house in accordance with the provisions of the "Lunatics Act, 1908," for a period or periods not less in the aggregate than ten years, within twelve years immediately preceding the suit and is unlikely to recover.

*Queensland.* Insanity is not a ground for divorce.

*South Australia.* Insanity is not a ground for divorce.

*Tasmania.* Insanity is not a ground for divorce.

*Victoria.* Insanity is not a ground for divorce.

*Western Australia.* By Act No. 7 of 1912, among the causes upon which a decree of divorce may be granted is the fact that the respondent is a lunatic or person of unsound mind, has been confined in an asylum or other institution in accordance with the provisions of the Lunacy Act of 1903 for a period or periods not less in the aggregate than five years within six years immediately preceding the suit, and is unlikely to recover.

#### FOREIGN COUNTRIES.

*Argentine Republic.* There is no absolute divorce on any grounds.

*Austria.* Insanity subsequent to marriage is not a ground for divorce.

*Belgium.* Insanity subsequent to marriage is not a ground for divorce.

*Bulgaria.* Insanity subsequent to marriage is not a ground for divorce.

*Brazil, Cuba and Mexico.* Absolute divorce is not obtainable.

*China.* Insanity subsequent to marriage is not in itself a ground for divorce.

*Denmark.* An administrative divorce may be obtained on the ground of supervening insanity.

*France.* Insanity subsequent to marriage is not a ground for divorce.

*The German Empire.* By the German Civil Code of 1900 insanity of three years' duration after the marriage is an absolute ground upon which a decree for divorce is granted throughout the German Empire.

*Greece.* Insanity is not a ground for divorce.

*Holland and Hungary.* Insanity is not a ground for divorce.

*Italy.* No divorce is permitted upon any grounds.

*Japan and Luxemburg.* Insanity is not a ground for divorce.

*Norway.* Either party to the marriage is entitled to a divorce where, at the time of marriage, the other party, without the knowledge of the former had suffered from insanity. Insanity for three years with no reasonable prospect of recovery is also a ground for divorce.

*Portugal.* Divorce may be obtained upon proof of incurable lunacy three years after the date upon which insanity has been declared by the competent authorities.

*Peru, Roumania and Serbia.* Insanity is not a ground for divorce.

*Russia.* Members of the Lutheran Church (other than those resident in Finland) may seek divorce in their Consistorial Courts upon the ground of the insanity of one of the parties to the marriage.

*Spain.* No divorce is permitted.

*Sweden.* One of the grounds for divorce is insanity of three years' duration which is pronounced incurable.

*Switzerland.* By the Civil Code of December, 1907, divorce may be obtained upon proof of insanity of a nature such as to render married life unbearable and which, after three years' duration, is pronounced incurable.

#### UNITED STATES OF AMERICA.

*Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.* Insanity occurring after the marriage is not a ground for divorce.

*Arkansas.* By an act approved on 28th March, 1895, the following ground for divorce was repealed:—"Where either party shall, subsequently to marriage, have become permanently or incurably insane."

*Florida.* On 25th April, 1901, a statute was enacted making incurable insanity for four years in either party a ground for absolute divorce. This statute was repealed on 11th May, 1905.

*Idaho.* By a statute of 4th February, 1895, permanent insanity is a ground for divorce: the insane person must have been duly and regularly confined in an asylum of a state for at least six years next preceding the commencement of the action for divorce, and such insanity must appear to the Court to be permanent and incurable.

*North Dakota.* By an act approved on 6th March, 1899, incurable insanity after two years' duration was made a ground for divorce: this was repealed on 15th February, 1901.

*Pennsylvania.* The husband may obtain an absolute divorce when the wife is a lunatic or *non compos mentis* and the petition is brought by any relative or next friend of the wife.

*South Carolina.* No divorce is allowed.

*Utah.* By an act approved on 9th March, 1903, permanent insanity of one of the parties is a ground for divorce, provided that the party shall have been duly and regularly adjudged insane by the legally constituted authorities of Utah or of some other State at least five years prior to the commencement of the action, and that it shall appear to the satisfaction of the Court that the insanity is incurable.

*Washington.* Absolute divorce may be granted in the discretion of the Court where either party is proved to have suffered for ten years or more from incurable chronic mania or dementia.

A survey of the foregoing statement shows that the laws of several non-Catholic countries, as well as those of New Zealand and of Western Australia, evince a tendency to regard the contract of marriage

as voidable upon proof of the confirmed insanity of one of the parties. In at least three of the North American States the Legislature has repealed, after a short trial, Acts which made the supervening insanity of one of the parties a ground for divorce.

If, as is proposed by the Royal Commission on Divorce, supervening insanity be made a ground for divorce in England, it would seem to be necessary, according to the principles of the law of contract, to alter the conditions as to the irrevocability of the marriage, which are commonly inserted in the contract of marriage. Apart from the ethical question involved, it may be considered inconsistent with public policy for the Legislature arbitrarily to introduce into a contract of the solemn nature of marriage, and to make retrospective, a condition which was not contemplated by either of the contracting parties at the date of the marriage.